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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1036 OF 2016
IN
SUIT NO. 807 OF 2014**

Anil Gupta & Ors	...Plaintiffs
<i>Versus</i>	
Sabari Developers LLP & Ors	...Defendants

Mr FE DeVitre, Senior Advocate, Mr Bomi Patel, Ms Poorva Garg & Mr Parikshit Barpujari, i/b Mulla & Mulla & CBC, for the Petitioner.

Mr Sharan Jagtiani, a/w Ms Deepa Pohuja, i/b M/s J Law Associates, for the Defendants Nos. 1, 1(a) to 1(d).

Mr Sandeep Patil, for the BMC.

Ms Pratibha Rupnawar, i/b VN Pohuja, for Defendants Nos. 2 to 4.

Mr Ramesh Kulkarni, Assistant Engineer (Building Proposal), M-Ward, present.

**CORAM: G.S. PATEL, J
DATED: 31st January 2017**

PC:-

1. The dispute relates to the two portions of an undivided plot at Chembur. This is Plot No. 437, CTS No. 1270, 10th Road, Chembur, Mumbai 400 071.

2. By a previous order dated 9th January 2017, I directed notice to be issued in the Notice of Motion to the Municipal Corporation of Greater Mumbai (“**MCGM**”). Mr Patil accepts notice. He is instructed by Mr Ramesh Kulkarni, Executive Engineer of the MCGM. For good order the Plaintiffs will formally join the MCGM as a Respondent to this Notice of Motion. Amendment to be carried out on or before 3rd February 2017 without need of reverification. Mr Patil has been given a copy of the papers.

3. This order will dispose of the Notice of Motion with a few clarifications and directions.

4. A brief understanding of the dispute between the Plaintiffs and Defendants Nos. 1 to 4 may be summarized thus: Since 1996/1998, the Chembur Plot has had a dividing wall that separates it into two land parcels. The western portion, of about 401.98 sq mtrs, has a ground plus two structure called Krishna Kunj. This is occupied and used by the Plaintiffs who run a hospital or medical facility there. The property to the east, about 595.92 sq mts, is being developed.

5. The dispute in this Notice of Motion relates to the marginal space requirement of the construction on the eastern plot. The plot has not been officially sub-divided at any time although it does seem that both side had at some point agreed to a subdivision of some kind. Whether or not this is possible or even necessary is not a matter that needs to be addressed.

6. It is also a matter of record that in regard to the new development on the eastern plot, necessary permissions from the traffic and fire departments have been obtained. There is no apprehension of any compromise on safety or health requirements.

7. The difficulty is only in regard to measuring the marginal space required under the DC Regulations for the new construction, i.e., about the available space to the western side of the new construction.

8. The stand of the MCGM is that since the compound wall is not on a recognized subdivision it cannot be taken into account. If the wall is taken into account, there is insufficient marginal space. If the wall is removed, then the open space will be measured from the outermost construction line of the new building's west face to the line of Krishna Kunj's eastern face. If this is the measure to be used, the marginal open space is enough to meet MCGM requirements, the 1st Defendant having obtained a marginal open space concession and paid a premium for that concession.

9. The Plaintiff's apprehension is that if this measure is used, any future development by the Plaintiffs on the Krishna Kunj plot will be compromised — the marginal open space will be deemed to have been 'used up' by the 1st Defendant's construction and unavailable to the Plaintiffs.

10. As a matter of record, in the past the MCGM has permitted owners of adjoining plots to undertake to each other and to the

MCGM not to raise any objections when this kind of sharing or commonality of marginal open space is agreed. In other words, the marginal open space requirement serves for both constructions and is not 'used up' by either one of the two. This seems to me perfectly logical. Consequently, in this case too such an undertaking can be taken from both the Plaintiffs and Defendants Nos. 1 to 4 and this will fully satisfy all Municipal and DC Regulation requirements.

11. I may note that Defendant No. 1, represented by Mr Jagtiani before me today, has applied for a discretionary reduction in the marginal space requirement and it has obtained this against payment of a premium which it has paid (and, if not, undertakes to pay).

12. The drawings annexed at pages 56 and 61 of this Notice of Motion paper book make it clear that the distance between the two buildings going from east to west is 7.55 mtrs at its minimum and at another point along the building lines about 8.13 mtrs. This is without taking into account the compound wall. It is agreed that with the discretionary reduction and on payment of premium this satisfies the necessary Municipal and Building requirements.

13. To allay all apprehensions on the Plaintiffs' part, Mr Jagtiani for Defendant No. 1 and Ms Rupnawar for Defendants Nos. 2 to 4 undertake to this Court that they will not object to the use of this open space to fulfil any marginal open space requirements for any future development of the portion occupied by the Plaintiffs, represented by Mr DeVitre, as and when the Plaintiffs decide to undertake development of that part of the plot (and which may

involve separately some open space concession for which the Plaintiffs will pay the premium as then applicable). It is therefore made clear that this requirement of marginal open space presently available to the 1st to 4th Defendant will also in future be available to the Plaintiffs. These undertakings will bind not only the Plaintiffs and Defendants Nos. 1 to 4 but also their respective successors-in-title, assignees or transferees, including all individual flat purchasers and any society as and when it is formed.

14. The MCGM is directed to accept these undertakings being given to and accepted as undertakings to this Court as being in sufficient compliance with the MCGM requirements. The MCGM will issue the necessary commencement certificate, occupation certificate and building completion certificate to the Defendant No. 1 without insisting on a removal or demolition of the compound wall. Similarly, as and when the Plaintiffs seek to develop their portion of the plot they will be entitled to apply and receive an IOD, commencement certificate, occupation certificate and building completion certificate without requiring the intervening compound wall to be broken and on the basis that the open space requirement is correspondingly met in whole or in part. Of course, if for a future development the Plaintiffs need to obtain a concession against a premium, they will be obliged to pay that premium; this order does not absolve them from that obligation.

15. It also goes without saying that in all future development, the building line as shown in the drawing at page 56 will have to be maintained by both sides so that this distance of 7.55 mtrs is

maintained at all times. Consequently, the existing compound wall can remain.

16. It is clarified that this order is made without any statement or concession made by or on behalf of the MCGM. The order is *in invitum* in relation to the MCGM on the basis of the material on record.

17. The undertakings given by Defendants Nos. 1 to 4 in the order of 4th April 2016 will continue pending the Suit, i.e., that the Defendant No. 1 has not sought and will not seek to use any rights available to the Plaintiffs in respect of the property in their occupation either in the form of FSI or in any other building benefits or entitlements.

18. The Notice of Motion is disposed of in these terms with no order as to costs.

19. Liberty to the parties to apply.

20. Liberty to file the Written Statement in the Registry, subject to proper numbering.

21. All concerned to act on an authenticated copy of this order.

(G. S. PATEL, J.)